

MICHAEL S. MAISTELMAN

Attorney at Law ♦ Court Commissioner

December 7, 2005

Via Facsimile 202-219-3923 & US Mail

Attorney Jeff S. Jordan
Supervisory Attorney - Complaints Examination & Legal Administration
Federal Election Commission
Office of the General Counsel
999 E. Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

1 2005 DEC 14 A 11:08

Re: In the Matter of Bryan L. Kennedy
MUR: 5683

Dear Attorney Jordan:

Enclosed please find Bryan Kennedy and the Bryan Kennedy for Congress Committee's Verified Response to the complaint filed in the above-referenced matter.

We desire to keep this matter confidential in accordance with 2 U.S.C § 437g (a)(4)(B) and § 437g(a)(12)(A).

Please contact me immediately if you require any additional information to assist you in your investigation of this matter.

Sincerely,



Michael S. Maistelman

MSM/
Enc.

C: Bryan Kennedy & Bryan Kennedy for Congress

3127 W. Wisconsin Avenue ♦ Milwaukee, WI 53208-3957
Telephone: 414.908.4254 Facsimile: 414.271.1884 Email: msmlaw@execpc.com

♦ Also licensed in Massachusetts

26044140916
91607147092

BEFORE THE FEDERAL ELECTION COMMISSION

Ross deRozer-Alves,
Complainant,

v.

Bryan Kennedy,
&
Bryan Kennedy for Congress,

Respondents.

VERIFIED ANSWER TO COMPLAINT
MUR 5683

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2005 DEC 14 A 11:08

The Respondents, Bryan Kennedy, and the Committee Bryan Kennedy for Congress (collectively "the Respondents") by their attorney Michael S. Maistelman, for their Answer to Complainant's Non-Verified Complaint, admit, deny, and allege as follows:

1. In the fall of 2004, Mr. Bryan Kennedy, a professor at the University of Wisconsin-Milwaukee, was the Democratic Candidate for the 5th congressional district of Wisconsin.

ANSWER: Answering paragraph one Respondents admit.

2. The University of Wisconsin-Milwaukee is a public institution, and as such must abide by Wisconsin statutes.

ANSWER: Answering paragraph two Respondents admit that the University of Wisconsin-Milwaukee is a public institution and Wisconsin Statutes speak for themselves and Respondents deny any interpretation proffered by the Complainant.

3. Mr. Kennedy used his campaign cell phone, with its campaign message recording, in the process of hiring teachers for the UWM. (H, the criminal complaint filed with the state [sic] of Wisconsin is included for total disclosure) [sic]

ANSWER: Answering paragraph three, Respondents deny these allegations by the

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Complainant. Respondent used his personal cell phone in the course of hiring one instructor because Respondent would likely be unreachable via his office number and Respondent would likely not receive any messages left at his home phone number until he returned home late at night. See Affidavit of Bryan Kennedy attached hereto and incorporated herein.

Respondents do not intend to respond to the additional "criminal" complaint that was attached to FEC complaint as Complainant explains above "for total disclosure". However, to the extent that a response is required, Respondents deny each and every allegation made therein and where appropriate incorporate by reference the responses given herein that are responsive to the allegations made therein.

4. In response to open documents requests, the [sic] Mr. Kennedy (responding for the University) claimed that this was his private cell phone (C), in his name.

ANSWER: Answering paragraph four, Respondents admit that at all relevant times the cell phone at issue was his personal cell phone and not a cell phone supplied by or paid through the University of Wisconsin- Milwaukee or the Bryan Kennedy for Congress committee.

5. It would be in violation of the FEC regulations for Mr. Kennedy to use campaign funds to pay for private household expenses that would exist independent of his campaign (I have provided a copy of FEC Regulations (Q). By Mr. Kennedy's campaign report, the cell phone was paid for by Mr. Kennedy's campaign. (I, page 4 of 6).

ANSWER: Answering paragraph five, FEC regulations speak for themselves and Respondents deny any interpretation proffered by the Complainant. Additionally, Respondents' campaign only paid for the portions of the cell phone bill that were attributed to campaign use. At

no time were any personal calls covered by the campaign.

6. However, if Mr. Kennedy's admitting to using campaign funds to pay for the cell phone, this is strong proof that Mr. Kennedy (and the UWM) knowingly violated the law (Wisconsin statutes).

ANSWER: Answering paragraph six, to the extent that said allegations require a response Respondents deny these allegations in their entirety as Respondents' campaign only paid for the portions of the bill that were attributable to campaign work. No personal calls were covered by the campaign.

7. Therefore, it appears that Mr. Kennedy has falsified his report to the FEC to cover his illegal activity.

ANSWER: Answering paragraph seven, to the extent that said allegations require a response Respondents deny these allegations in their entirety and take offense to the spurious and wholly unsupported conclusion of law that the activity was "illegal".

8. In January, 2005, after an open documents request (A) dated December, 2004 which attempted to get UWM documents justifying Mr. Kennedy's illegal activities, Mr. Kennedy altered his expense report to the FEC, dated 1/02/2005. (J) In this report Mr. Kennedy claims that his campaign paid only the cell phone overages, even though the amount paid did not change from the original to the amended report.

ANSWER: Answering paragraph eight, to the extent that said allegations require a response, Respondents deny these allegations in their entirety and take offense to the spurious and wholly unsupported conclusion of law that the activity was "illegal".

In addition, the FEC requested additional information on campaign expenditures and Respondents submitted the requested items in the time-frame requested by the FEC.

9. This appears to be a transparent attempt for his cell phone to be at the same time both a personal cell phone and campaign cell phone, thus covering up Mr. Kennedy's illegal activities.

ANSWER: Answering paragraph nine, to the extent that said allegations require a response, Respondents deny these allegations in their entirety and take offense to the spurious and wholly unsupported conclusion of law that the activity was "illegal".

AFFIRMATIVE DEFENSES

1. The Complaint in the above-captioned matter was never signed, sworn and notarized as required by FEC regulations and procedures. The only document that was notarized was Complainant's cover filing sheet, not the actual complaint.

2. The Complaint fails to differentiate between statements based on the complainant's personal knowledge and those based upon information and belief as required by FEC regulations and procedures.

3. The Complaint must be dismissed on its merits as a complaint cannot be brought based solely upon "information and belief". Complainant has no first hand knowledge nor has offered any proof that any violations of law have occurred.

4. The Complaint fails to state a claim upon which relief may be rendered.

5. Any and all expenditures and activities of Respondents' campaign were properly reported to the Federal Election Commission as required by law.

WHEREFORE, Respondents respectfully request that the Federal Election Commission dismiss Complainant's complaint with prejudice, award Respondent actual attorney's fees and for other such relief that is just and equitable.

Dated at Milwaukee, Wisconsin this 6 day of December 2005

ATTORNEY MICHAEL S. MAISTELMAN

By: 

Michael S. Maistelman

Wisconsin State Bar No. 1024681

Counsel for Respondents

P.O. ADDRESS:

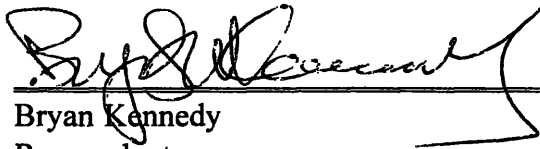
Law Offices of Michael S. Maistelman
3127 W. Wisconsin Avenue
Milwaukee, Wisconsin 53208
(414) 908-4254
(414) 271-1884 (Fax)

VERIFICATION

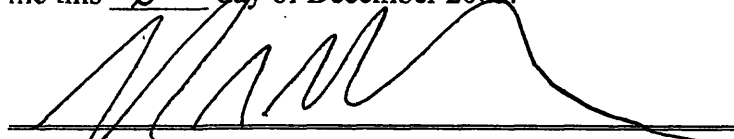
Bryan Kennedy, being first duly sworn, on oath, deposes and says as follows:

That he has read the foregoing Verified Answer and that the same is true and correct, except as to those matters therein stated upon information and belief and, as to those matters, he believes them to be true.

Dated at Milwaukee, Wisconsin this 6th day of December 2005


Bryan Kennedy
Respondent

Subscribed and Sworn to before
me this 6 day of December 2005.



Notary Public, State of Wisconsin

My Commission [Expires _____] [Is Permanent].

26044140922

BEFORE THE FEDERAL ELECTION COMMISSION

Ross deRozier-Alves,
Complainant,

v.

MUR 5683

Bryan Kennedy,
&
Bryan Kennedy for Congress,

Respondents.

AFFIDAVIT OF BRYAN KENNEDY

STATE OF WISCONSIN)
) ss
MILWAUKEE COUNTY)

Bryan Kennedy, on oath, states:

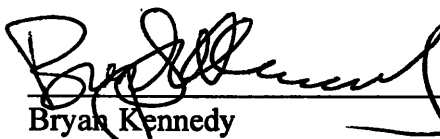
1. My name is Bryan Kennedy. In 2004, I was a candidate for the 5th Congressional District seat in Wisconsin. At all times relevant my campaign committee was and is properly registered with the Federal Election Commission.
2. The cell phone at issue was, at all relevant times, my personal cell phone. The cell phone was purchased by me with personal funds. The only portions of my cell phone bill, which were paid for by my campaign committee, were the cell phone expenses that were incurred by the campaign committee. For instance the August 2004 cell phone bill was \$277.68. Of that amount my campaign committee paid for its usage of my phone in the amount of \$208.91. Likewise, the September 2004 cell phone bill was \$228.21 and my campaign was responsible for charges of \$126.35. The charges reimbursed by my campaign for cell phone usage were ordinary and reasonable and there were no allegations in the unverified complaint to the contrary. *See Attached Cell Phone Bills.*
3. I did use my cell phone in the course of hiring the instructor for the night course of Portuguese 103. My department does not have voicemail and I share a phone line with three other faculty offices. I thought it best to use my personal cell phone, rather than a UWM office number where I would most likely not be reachable, or a home phone number where I would only get the

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message after 9 or 10 pm, upon arriving home from campaigning. I used my cell phone because it would allow the individuals to reach me directly and in a timely fashion. My recording did not state that one had reached the campaign, but rather that the caller had reached "Bryan Kennedy, Democratic candidate for Congress in the 5th Congressional district."

4. Mr. deRoziert-Alves had applied for a job at the University of Wisconsin-Milwaukee to teach a night course of Portuguese 103. I am the only University Portuguese Professor and was one of the individuals responsible for the hiring for this position.
5. Mr. deRoziert-Alves was unhappy that he was not hired by the University of Wisconsin so he filed a complaint with the University of Wisconsin claiming he was not hired because he was not enthusiastic about my campaign. Upon review by the University of Wisconsin, the complaint was dismissed for lacking any merit. Attached hereto and incorporated herein As Exhibit "A" is UWM Dismissal.
6. Mr. deRoziert-Alves then filed a second complaint against me with the Equal Rights Division of the Wisconsin Department of Workforce Development, ("ERD") claiming he was discriminated against and was not hired because, he is not a native speaker of Portuguese. It too was thrown out by the ERD for lacking merit. Attached hereto and incorporated herein As Exhibit "B" is ERD Dismissal.
7. This affidavit is made in support of the verified answer and affirmative defenses which was filed in the above-captioned matter.
8. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated at Milwaukee, Wisconsin this 6th day of December 2005


Bryan Kennedy

Subscribed and Sworn to before
me this 6 day of December 2005.


Notary Public, State of Wisconsin

My Commission [Expires _____] [Is Permanent].

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CELL PHONE BILLS

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How To Contact Us:

- 1-800-331-0500 or 611 from your cell phone
- For Deaf/Hard of Hearing Customers (TTY/TDD)
1-866-241-6567

Wireless Number(s)

Previous Balance	277.68
Payment Posted	-277.68
BALANCE	0.00
Monthly Service Charges	59.98
Usage Charges	143.14
Credits/Adjustments/Other Charges	7.01
Taxes	18.08
TOTAL CURRENT CHARGES	228.21
Due Sep 25, 2004	
Late fees assessed after Oct-01	

1 ! 4. 11. 11. \$228.21

**Return the portion below with
—payment to Cingular Wireless only.**

Number	Service	Minutes	Minutes	Minutes	Charges
08/02-09/01	49 99	122	203	80	31.20
08/02-09/01	9 99	578	523	287	111 93
Total	59.98	700	726	367	143.13

Summary of Rollover Minutes for the Group

Previous Rollover Balance	0
Unused Package Minutes Added to Rollover	0
Rollover Minutes Expired This Month (*)	0
Current Rollover Balance	0

(*) Minutes expire if not used by end of 12th Month

Wireless Line Summary For:

User Name: BRYAN W. KENNEDY

Monthly Service Charges	Period	Monthly Charge	Total Charge
Rate Plan			
FT CNGSM 700R/5K NW	09/02-10/01	49 99	49 99
Includes:			
- CALL WAITING			

How To Contact Us:

- 1-800-331-0500 or 611 from your cell phone
- For Deaf/Hard of Hearing Customers (TTY/TDD)
1-866-241-6567

Wireless Number(s)

Previous Balance	121.35
Payment Posted	-121.35
BALANCE	0.00
Monthly Service Charges	59.98
Usage Charges	187.59
Credits/Adjustments/Other Charges	8.10
Taxes	22.01
TOTAL CURRENT CHARGES	277.68
Due Aug 25, 2004	
Late fees assessed after Sep 01	
Total Amount Due \$277.68	

Spanish Bills

Do you prefer your bills in Spanish? Call 1-866-Cingular for more details.
¿Prefieres tus facturas en español? Llama al 1-866-Cingular para más detalles.

Return the portion below with payment to Cingular Wireless only.

Number	Service	Minutes	Minutes	Minutes	Charges
	49 99	53	152	82	31 98
	9 99	647	578	399	155 61
Total	59 98	700	730	481	187.59

Summary of Rollover Minutes for the Group

Previous Rollover Balance	0
Unused Package Minutes Added to Rollover	0
Rollover Minutes Expired This Month (*)	0
Current Rollover Balance	0

(*) Minutes expire if not used by end of 12th Month

Wireless Line Summary For:

User Name: BRYAN W. KENNEDY

Monthly Service Charges	Period	Monthly Charge	Total Charge
Rate Plan			
FT CNGSM 700R/5K NW	08/02-09/01	49 99	49 99
Includes:			
- CALL WAITING			

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EXHIBIT A

26044140928



College of Letters and Science
Office of the Dean

Holton Hall
PO Box 413
Milwaukee, WI
53201-0413

September 8, 2004

Mr. Ross deRozier-Alves

Elm Grove, WI 53122

Dear Mr. deRozier-Alves:

I am responding to your September 2, 2004 letter to Assistant Dean William Horstman and me in which you register a complaint about the criteria used by the Department of Spanish and Portuguese in hiring an instructor for a section of Portuguese 103 for semester I, 2004-05.

I directed Associate Dean Charles Schuster, who is responsible for the College-level administration of the Department of Spanish and Portuguese, and Assistant Dean Horstman to investigate your complaint and report back to me. The salient points of their investigation are as follows:

- Assistant Professor Brian Kennedy provided Dean Schuster with a written summary of the recruitment process, including the CVs of the five people who applied to teach Portuguese 103.
- Deans Schuster and Horstman met separately with Professor Ismael Marquez, Chair of the Department, and Assistant Professor Kennedy on Friday, September 3. At those meetings, the following information was established:
 - i. Professor Kennedy confirmed that the subject of his political candidacy was mentioned briefly during your interview with him. He maintains that the discussion had no bearing on the goals or outcome of the interview.
 - ii. Professor Kennedy recommended both you and one other candidate as the most qualified two applicants to Professor Marquez for a final interview. He did so without attaching any information of his own or indicating whom he preferred
 - iii. Professor Marquez conducted a separate interview with both you and the other finalist. He reached his own independent decision about which candidate he thought was most qualified. After doing so, he spoke to Professor Kennedy, who agreed with his decision.

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Mr. Ross deRozier-Alves
September 8, 2004
Page 2

- iv. Neither you nor the other finalist for this position were known to either Professor Kennedy or Professor Marquez prior to the interviews, and neither you nor the other finalist were employees of, or graduate students at, the University of Wisconsin-Milwaukee.
- v. The criteria that Professors Kennedy and Marquez used to evaluate all the candidates were completion of a master's degree, teaching experience, native speaker status, and professional comportment.

Following the meetings between Deans Schuster and Horstman and Professors Marquez and Kennedy, Dean Schuster and Professor Marquez reviewed the CVs of all the applicants and also reviewed the selection criteria. It was their judgment that both you and the other finalist were qualified to teach the Portuguese 103 course but that the other candidate's qualifications were stronger. I am satisfied that the final selection by Dean Schuster and Professor Marquez was based on appropriate criteria and that the evaluation of the applicants was fair and objective.

I hope that this response satisfactorily addresses your concerns. Thank you for your interest in Portuguese instruction at UW-Milwaukee and best wishes for continued professional success.

Sincerely,



G. Richard Meadows
Dean

cc. Associate Dean Charles Schuster
Assistant Dean William Horstman
Professor Ismael Marquez

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Office of Legal Affairs

November 30, 2004

Equal Rights Officer James Drinan
Department of Workforce Development
Equal Rights Division
819 North 6th Street, Room 255
Milwaukee, Wisconsin 53203-1687

Chapman Hall 380
PO Box 413
Milwaukee, WI
53201-0413
414 229-4278 *phone*
414 229-3919 *fax*

Re: *Ross deRozier-Alves v. University of Wisconsin—Milwaukee*
ERD Case No. CR200404337

Dear Mr. Drinan:

Attached is the Position Statement of the Respondent, the University of Wisconsin—Milwaukee, in the above-referenced matter. By copy of this letter, I am providing UWM's complete response to the Complainant.

The witnesses we have contacted in drafting this Position Statement are listed in Section I of the document. Interviews the Division wishes to conduct with these witnesses may be facilitated through my office.

Additionally, please note that I am the attorney for the Respondent in this matter. Therefore, I would appreciate it if future correspondence regarding the above-referenced case were directed to me. Likewise, please do not hesitate to contact me if you require any additional information.

Very truly yours,

Suzanne L. Carter

Suzanne L. Carter
University Legal Counsel

cc: Mr. Ross deRozier-Alves (w/Position Statement and exhibits)
1460 Blue Ridge Blvd.
Elm Grove, Wisconsin 53122

Professor Ismael Márquez (w/Position Statement)

✓ Assistant Professor Bryan Kennedy (w/Position Statement)

Interim Director Robin Van Harpen, Office of Legal Affairs (w/Position Statement)

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**EQUAL RIGHTS DIVISION
DEPARTMENT OF WORKFORCE DEVELOPMENT**

DEROZIER-ALVES, ROSS,

Complainant,

**RESPONDENT'S
POSITION STATEMENT**

v.

ERD Case No. CR200404337

UNIVERSITY OF WISCONSIN—MILWAUKEE,

Respondent.

The University of Wisconsin—Milwaukee (UWM), Respondent, hereby submits this Position Statement in response to the Discrimination Complaint filed by Ross deRozier-Alves, Complainant, on November 4, 2004. Attached to this Position Statement are Exhibits 1 through 18.*

The Respondent's position in this matter is that the Complainant's allegations of national origin-based discrimination have no basis in either the facts or the law.

I. INTRODUCTION

In formulating this response, the UWM Office of Legal Affairs has consulted with Assistant Dean William Horstman, Professor Ismael Márquez and Associate Professor Bryan Kennedy.

The Complainant alleges that he suffered discrimination based on his American national origin and that he was denied the position of Associate Lecturer in UWM's Department of Spanish and Portuguese as a result. In fact, UWM had legitimate, nondiscriminatory reasons for its decision to hire Cassio Muniz, the most qualified candidate in the application pool. The Respondent did not discriminate against the Complainant based on his American national origin.

II. FACTUAL SUMMARY

As the facts demonstrate, the UWM employees conducting the Associate Lecturer recruitment conducted the recruiting process in a fair, law-abiding manner and ultimately selected the most capable applicant for the position.

* Confidential information contained within these exhibits has been redacted.

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A. BACKGROUND

With approximately 3,300 employees and roughly 23,000 undergraduate and graduate students, UWM is the second largest school in the University of Wisconsin System, which encompasses thirteen four-year universities as well as thirteen freshman/sophomore campuses. (Exhibits 1-2.) UWM consists of twelve academic schools or colleges. (Exhibit 3.) The largest school or college at UWM is the College of Letters and Science (L&S). (Exhibit 4.) L&S includes 21 academic departments, including the Department of Spanish and Portuguese (the Department). (Exhibit 5.)

The Department is relatively small; it employs eight faculty members. (Exhibit 6.) Only one such faculty member, Assistant Professor Bryan Kennedy, specializes in Portuguese and related courses; the remaining seven faculty members specialize in Spanish and related courses. (Exhibit 7.) Professor Ismael Márquez serves as chair of the Department. (Exhibit 8.)

The Department employs lecturers for Portuguese courses when it determines that student interest in Portuguese courses is great enough to warrant an additional instructor.

B. THE RECRUITING PROCESS

In early August of 2004, Prof. Márquez and Prof. Kennedy noted that there was sufficient demand for a night course of First Semester Portuguese and decided to search for an instructor for the course. (Exhibit 9.) With Prof. Márquez's support, Prof. Kennedy placed an advertisement for the position on a local Portuguese-language listserv. (Exhibits 9-10.)

In response to this advertisement, Prof. Kennedy received curriculum vitae from five candidates. (Exhibit 9.) Prof. Kennedy called each of the five candidates to schedule an on-campus interview with him. (Exhibit 9.) One of the candidates declined the opportunity to interview. (Exhibit 9.) A second candidate did not appear at her scheduled interview. (Exhibit 9.) At approximately the same time, Alcita Brown, a former Ad Hoc Lecturer in the Department, asked to be considered for the position. (Exhibit 9.) Ms. Brown was in Brazil at the time and therefore could not participate in an on-campus interview, but Prof. Kennedy and Prof. Márquez were familiar with her teaching style, both from past course evaluations and from previous interactions with her. (Exhibit 9.)

At the time of the interviews, Prof. Kennedy was a candidate to represent Wisconsin's Fifth Congressional District in the U.S. House of Representatives. (Exhibit 11.) According to Prof. Kennedy, on the date of the Complainant's interview, he was storing one of his yard signs for a colleague behind his office door. Prof. Kennedy recalls that the Complainant inquired about the sign at the end of the interview, and Prof. Kennedy acknowledged he was a candidate. The Complainant responded by commenting, "oh, okay" or something similarly non-committal, and Prof. Kennedy concluded the interview.

After the interviews, Prof. Kennedy determined that the Complainant, Ms. Brown and Cassio Muniz were the strongest candidates for the position. (Exhibit 9.) He recommended that Prof. Márquez interview Mr. Muniz and the Complainant and consider Ms. Brown in deciding who to hire. (Exhibit 9.) Prof. Kennedy and Prof. Márquez state that Prof. Kennedy did not provide Prof. Márquez with his impressions of the candidates or any information additional to the candidates' curriculum vitae.

Prof. Márquez recalls that he considered Prof. Kennedy to be the Department's Portuguese expert and as such assumed the final candidates had the level of fluency necessary to teach the course. He did not speak Portuguese to the candidates but rather tried to get a sense of their respective teaching styles.

C. THE HIRING PROCESS

After Prof. Márquez's interviews with the candidates were complete, he discussed their strengths and weaknesses with Prof. Kennedy. (Exhibit 9.) Prof. Márquez and Prof. Kennedy agreed that Mr. Muniz was the strongest candidate, given his Master of Arts from the University of Brasilia, his experience as a professor at the Catholic University of Brasilia, and his professional yet dynamic and enthusiastic manner. (Exhibits 9, 12.) By contrast, Prof. Márquez recalls that he felt the Complainant had an impressive resume but lacked energy and a passion for teaching. (Exhibit 13.) Prof. Márquez feared that he could bore a class, particularly given that first-year foreign-language course material tends to be rather dry.

Prof. Kennedy subsequently telephoned Mr. Muniz to offer him the position. (Exhibit 9.) He also e-mailed Ms. Brown and telephoned the Complainant in order to let them know that the Department had offered the position to another candidate. (Exhibit 9.)

Contrary to the Complainant's assertion, Mr. Muniz did not have "political connections" to Prof. Kennedy; in fact, according to Prof. Kennedy, he had never heard of Mr. Muniz or the Complainant prior to receiving their application materials. Additionally, the Complainant's allegation that UWM reported two different people had been hired for the position is simply not factual. Mr. Muniz was the only person to whom an offer was extended; he has been teaching First-Semester Portuguese throughout the Fall 2004 Semester, and he will teach Second-Semester Portuguese during the Spring 2005 Semester. (Exhibits 14-15.)

D. POST-HIRING ACTIVITY

On September 2, the Complainant e-mailed L&S Dean G. Richard Meadows and Assistant Dean William Horstman in order to register a complaint about the criteria the Department used to select Mr. Muniz. (Exhibit 16.) The Complainant alleged that he was not selected for the position due to his political affiliation and complained about the presence of Prof. Kennedy's campaign signs in his office during the interview.

The Department conducted an investigation of this complaint. (Exhibit 16.) On September 8, Dean Meadows responded to the Complainant to notify him that an investigation of his

complaint had been conducted and that L&S had found that the "selection [of Mr. Muniz] was based on appropriate criteria and that the evaluation of the applicants was fair and objective." (Exhibit 16.) Dean Meadows wrote that the criteria used to evaluate the candidates included "completion of a master's degree, teaching experience, native speaker status, and professional comportment." (Exhibit 16.) Dean Meadows's reference to "native speaker status" was not intended to apply that an individual from a particular country was preferred for the position. In fact, the Department makes no distinction between "native" and "near-native" speaker status. (Exhibit 10.) "Native or near-native" status is a common requirement for language instructor position and simply means that the individual is close to being as fluent in the language as is a native speaker. (Exhibit 17.)

Had native speaker status been a requirement for the position, the Complainant would not have been invited for a second interview, as he would have been deemed to lack the relevant qualifications. Moreover, the Department has hired many near-native speakers; indeed, Prof. Kennedy was born in Maryland and has lived most of his life in the United States. (Exhibit 18.)

The Complainant was not a victim of discrimination. Mr. Muniz simply outshone the Complainant, particularly with regard to his enthusiasm for teaching and his prior classroom experience.

III. LEGAL ANALYSIS

The Complainant has articulated no direct evidence of discrimination. Therefore, he must use the burden-shifting method of proof articulated in *Currie v. State Department of Industry, Labor & Human Relations, Equal Rights Division*, 565 N.W.2d 253, 258 (Wis.App. 1997). Under that framework, the Complainant is required to establish a *prima facie* case of discrimination by demonstrating that (1) he is a member of a protected class under the Wisconsin Fair Employment Act (WFEA), § 111.322(1), Wis. Stat.; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) others not in the protected class were treated more favorably. If the Complainant establishes discrimination per this structure, UWM must articulate a legitimate, nondiscriminatory reason for the Complainant's rejection. If UWM meets this burden, the Complainant may attempt to prove by a preponderance of the evidence that the reasons offered by UWM are merely a pretext for discrimination. *Id.*

Wisconsin courts have never evaluated whether American national origin qualifies as a protected status under WFEA. While not discounting the possibility that American national origin could be considered a protected status, the Personnel Commission has urged decision-makers to look to whether a claim of discrimination based on American national origin is reasonable given the relevant facts. *Wilson v. Wisconsin State Assembly*, Case No. 02-0064-PC-ER, at 7 (Personnel Commission 2003). In this case, it is unreasonable, given that the Department employs numerous instructors of American national origin, including Prof. Kennedy, and the Complainant was invited for a second interview even though he was of American national origin.

The Complainant suffered an adverse employment action in not being offered the position, and another applicant not of American national origin—namely, Mr. Muniz—was treated more

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favorably than he was in that he was ultimately selected for the position. Moreover, given that the Complainant advanced to the second interview, the Respondent will not argue for purposes of this Position Statement that he was not qualified for the position. Even if the Division grants that the Complainant has established a *prima facie* case of discrimination, however, UWM can articulate a legitimate, non-discriminatory reason for his non-hire. Prof. Márquez and Prof. Kennedy believed that Mr. Muniz was more qualified than the Complainant because he was more professional, enthusiastic and dynamic in his interview than the Complainant, and they felt that such conduct indicated he was better suited to teaching. An employer's belief that a given applicant is the most qualified candidate for the position is a legitimate, non-discriminatory reason for hiring that applicant. *Buchanan v. Tower Automotive, Inc.*, 31 F.Supp.2d 644, 657-658 (E.D. Wis. 1999).

Superior interview performance has been recognized as a legitimate, non-discriminatory reason for hiring a particular applicant. *Gronning v. School District of Viroqua Area* is particularly instructive in this regard. In *Gronning*, an experienced teacher held that a school district's non-hire of her had to indicate sex discrimination, given her superb credentials on paper. In turn, the school district argued that the teacher's interview performance was inferior to that of the candidate who was ultimately offered the position. The school district maintained that the teacher's inferior interview performance revealed that her organization and communications skills were not equal to those of the other candidates and therefore rendered her not as qualified for the position. The Labor and Industry Review Commission held that it is legitimate to use interview performance to determine which candidate should ultimately be selected, particularly in an educational setting, given the communications skills and presence required. *Gronning*, ERD Case No. 8900419, at 5-8 (Labor and Industry Review Commission 1993). *See also Larson v. City of Tomah Police Department*, ERD Case No. 9101065, at 13-14 (Labor and Industry Review Commission 1994) (holding that it is legitimate to use selective criteria to determine which candidate is most qualified for a given position).

The Complainant has not shown and cannot show that UWM's behavior was based on his status as an American. Because the Complainant cannot establish a case of discrimination, his complaint should be dismissed.

IV. CONCLUSION

The facts and circumstances documented in the accompanying materials do not warrant a belief by a prudent person that the Complainant was discriminated against in violation of WFEA. The Respondent therefore respectfully requests the Division to find and order accordingly.

Dated this 30th day of November, 2004.

UNIVERSITY OF WISCONSIN-MILWAUKEE

By: Suzanne L. Carter

Suzanne L. Carter

Wisconsin Bar No. 1041097

University Legal Counsel

Attorney for Respondent

MAILING ADDRESS:

Office of Legal Affairs

P.O. Box 413

Milwaukee, Wisconsin 53201

(414) 229-4278

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EXHIBIT B

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Jim Doyle
Governor

Roberta Gassman
Secretary

Lucía Nuñez
Division Administrator



State of Wisconsin
Department of Workforce Development

EQUAL RIGHTS DIVISION
819 No. Sixth Street, Rm. 255
Milwaukee, WI 53203-1687
Telephone: (414) 227-4384
TTY: (414) 227-4081
FAX: (414) 227-4084
http://www.dwd.state.wi.us
e-mail: DWDDER@dwd.state.wi.us

DATED AND MAILED MAR 03 2005

Ross deRozier-Alves
1460 Blue Ridge Blvd.
Elm Grove, WI 53122
Complainant

vs.

University of Wisconsin -
Milwaukee
C/O Legal Affairs
PO Box 413
Milwaukee, WI 53201-0413
Respondent

OFFICE OF LEGAL AFFAIRS
MAR - 3 2005
RECEIVED

INITIAL DETERMINATION -
NO PROBABLE CAUSE

ERD Case No. 200404337
EEOC Case No. 26GA500214

RECEIVED
2005
OFFICE OF LEGAL AFFAIRS

I. THE DIVISION DECIDED:

There is no probable cause to believe University of Wisconsin - Milwaukee violated the Wisconsin Fair Employment Law, sec. 111.31-111.395, Stats., by:

A. refusing to hire or employ the Complainant because of national origin

The complaint is therefore dismissed.

II. THIS MEANS:

The Equal Rights Division found no reason to hold a formal hearing on the complaint and is dismissing the complaint.

III. THE NEXT STEP IS:

The dismissal will become final unless the Complainant submits a written appeal letter to the Equal Rights Division, 819 North 6th Street, Milwaukee, Wisconsin 53203. The appeal letter must be received within 30 days of the date this determination was mailed. (The DATE OF MAILING is stamped at the top of the Initial Determination) In the appeal letter, the Complainant must state the specific reasons for appealing.

If the Complainant files a timely appeal, this case will be certified for a formal administrative hearing. After the hearing, an Administrative Law Judge will decide if

there is probable cause to believe that a violation occurred. A notice of hearing stating the date, time and place of hearing will be sent to the parties. This notice will also include an information sheet, as well as a copy of the statutes and administrative code. At the hearing, the parties will be given the opportunity to present evidence to support their cases. Neither the Initial Determination, nor the evidence presented to the Equal Rights Division during the investigation of this case, will automatically become part of the record at hearing. The Administrative Law Judge will only consider evidence presented at the hearing. The parties may wish to consult with an attorney for legal advice. The Division will close this case without further action if no timely appeal is received.

IV. DATE OF FILING AND/OR INITIAL WRITTEN CONTACT:

- A. The Complainant first contacted the Division in writing on November 3, 2004 alleging employment discrimination. The Division accepted the Complainant's complaint on November 3, 2004.

V. THE DIVISION DECIDED THERE WAS NO PROBABLE CAUSE BASED ON THE FOLLOWING INFORMATION:

- A. The Complainant, who was born in the United States, applied for a part-time Associate Lecturer's position with the Respondent in its Department of Spanish and Portuguese on August 18, 2004. The Complainant stated that he initially interviewed for the position with Professor Bryan Kennedy and later with Professor Ismael Marquez. The Complainant noted that neither interviewer asked him about his relevant experience, training or for references. The Complainant alleged that Professor Marquez was "blatantly uninterested" in learning more about him.

The Complainant alleged that the Respondent initially reported that a person with political connections to Professor Kennedy was hired for the position. Later, the Respondent reported that a Hispanic applicant was hired. The Complainant believed that his qualifications for the teaching position were superior to those of the individual hired, therefore, the Respondent likely considered his national origin when making the hire decision.

- B. The Respondent provided the following information in response to the complaint:

1. The Complainant applied for an Associate Lecturer's position in the Respondent's Department of Spanish and Portuguese. The Department employs eight faculty members with only Assistant Professor Bryan Kennedy teaching Portuguese, while the remaining seven specialize in Spanish. Professor Ismael Marquez serves as chair of the Department. The Department employs lecturers for courses in Portuguese when interest in such courses warrants an additional instructor.
2. In early August 2004, it was determined that there was sufficient demand for one night course in first semester Portuguese for the upcoming semester. An advertisement was placed on a local Portuguese-language listserv and the Respondent received curriculum vitae from five candidates, including the Complainant. All five candidates were contacted for an interview with Mr. Kennedy. Three candidates, including the Complainant and the successful candidate, Cassio Muniz, accepted and attended the interview. A fourth candidate, Alcita Brown, was in Brazil at the time and she asked to be

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considered for the position. Ms. Brown had formerly worked for the Respondent as a Lecturer in the Department and Mr. Kennedy and Mr. Marquez were familiar with her teaching style and past student evaluations. She was considered along with the Complainant and Mr. Muniz for the position, while the other candidates were eliminated from further consideration.

3. The criteria utilized by the Respondent when evaluating candidates included completion of a master's degree, teaching experience, native speaker status and professional comportment. The Respondent stated that native speaker status referred to the ability to speak the language as well as a native speaker. The Respondent noted that Mr. Kennedy was born in Maryland, thus the Respondent does not require language teachers to be born in a country that speaks the language they are to teach.
4. The Complainant and Mr. Muniz were viewed as qualified for the position and Mr. Kennedy recommended both to Mr. Marquez for a second interview. Mr. Marquez interviewed both candidates and also considered Ms. Brown when meeting with Mr. Kennedy to discuss which candidate to hire. Both Mr. Kennedy and Mr. Marquez believed that Mr. Muniz was the strongest candidate. The position was offered to Mr. Muniz, who was born in Brazil, and he accepted the position.

The Respondent stated that Mr. Muniz was chosen due to his background as a professor at Catholic University of Brasilia and his "professional yet dynamic and enthusiastic manner." The Complainant, the Respondent alleged, had an "impressive resume", but he "lacked energy and passion for teaching."

5. A review of the faculty and academic staff in the Department revealed that only a minority of staff had Spanish surnames. The Respondent noted that the Department employs a staff of mixed ancestry /national origins.
- C. The Complainant noted that the Respondent placed the advertisement for the position with a Brazilian social group on a Yahoo web site, rather than a Portuguese list serve. Thus, the Complainant believed, the Respondent only intended the advertisement to reach Brazilian applicants. Since the Complainant's wife is of Brazilian national origin, the Complainant was able to apply for the position. The Complainant further noted that Mr. Kennedy used his private e-mail address and private telephone number when advertising the position.

The Complainant did not believe that either Mr. Kennedy or Mr. Marquez took him seriously during the interview process as neither asked him about his educational or employment background. The Complainant noted that he had taught first semester Portuguese three times and second semester Portuguese once at the University of Wisconsin-Madison. Mr. Muniz's teaching experience was in political science, rather than teaching a language. Thus, the Complainant believed his teaching background was superior to that of Mr. Muniz.

The Complainant also wrote at length about political considerations in the hiring process as well as the Respondent's failure to follow normal hiring procedures and their alleged falsification of documents involved in the hiring process. This

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information, however, was not particularly relevant to the charge of national origin discrimination.

VI. INVESTIGATOR'S EXPLANATION:

- A. While much was written by the Complainant in an attempt to substantiate his complaint, the matter simply comes down to the Respondent choosing between two qualified candidates for a part-time teaching position. The Complainant was unable to substantiate that the Respondent made the hire decision based on national origin, rather than the stated reason in its position statement.

James Drinan
Equal Rights Officer

cc: Complainant
Respondent
Suzanne Carter, Respondent's Legal Counsel
EEOC

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Robin Harper

4. **Statement of discrimination:**

Please describe the events that led you to file this complaint. Give the date each action occurred and the name of the person who took the action. Explain how each action(s) was related to the box (es) you checked on page one.

On August 18th 2004, I applied for a teaching position in the department of Spanish and Portuguese at the University of Wisconsin-Milwaukee.

The recruitment and selection for this position was based upon national origin, in clear violation of Title VII. I met with 2 members of the department, Professor Bryan Kennedy and Professor Ismael Marquez; the so-called "interview" was in two parts, one separately with Professor Kennedy and one separately with Professor Marquez. In the "interview", there were no questions about my relevant experience, no references requested, no attempt to discern my qualifications for the position, no questions about my specialized training for this position. I specifically inquired, with both Prof. Marquez and Prof. Bryan Kennedy, both during the interview, through phone messages and via email, if there were any questions relevant to my qualifications. My emails and phone messages went unanswered, and during my interview with Professor Marquez, he was blatantly uninterested. It became very clear in my investigation that this was due to my national origin.

The University was reporting at that time that person with political connections to Prof Kennedy was hired. I wrote a very detailed letter to the Dean of the College of Letters and Science, Dean Meadows. This letter included minute details of the process, which I had written down after the individual interviews. After my complaint was filed, the University started to report a different person than had been originally reported was hired.

Dean Meadows was fully and unambiguously aware that Prof. Marquez and Prof. Kennedy were in violation of the law, violating Title VII. In a letter to me he gave his explicit approval of this violation. The letter was mailed to me only the day after the position started; an email copy was sent to me hours before the position started, and only as a response to a direct email I had made myself. I was never contacted by anybody in the Dean's office for questions or follow-up investigation.

A nondiscriminatory examination of my qualifications shows that they are clearly and demonstrably superior to those of the person chosen, and the result would have been different had the University recruited and hired in a fair and legal manner.

I very much look forward to presenting the evidence (which is extremely well documented) to the EEOC; the evidence is well beyond the burden of proof required.

Thank you,
Ross deRozer-Alves

5. **Certification and Signature**

By my signature below, I certify that I have read the above complaint, and, under penalties of law, I declare that this complaint is true and correct to the best of my knowledge and belief.

6. **Signature of complainant or authorized representative**

Date signed



Nov 2nd, 2004

Mail your completed and signed complaint to:

Equal Rights Division, 819 North 6th St, Room 255 Milwaukee, WI 53203 for violations in Milwaukee, Waukesha, Ozaukee, Washington, Kenosha, Racine, Sheboygan and Walworth Counties

Equal Rights Division, P O Box 8928, Madison, WI 53708 for all other counties in Wisconsin

Website: <http://www.dwd.state.wi.us/er>

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